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82-498

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1982

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NO. _____

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MRS. AAGE LASSE ALVESTAD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF AAGE LASSE ALVESTAD, AND THEIR MINOR DAUGHTER,

Petitioners

V.

MONSANTO COMPANY,
MONSANTO OIL U.K., INC.,
DOLPHIN INTERNATIONAL, INC.,
AND
DOLPHIN INTERNATIONAL, S.A.,

Respondents

- - - - - - -

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

- - - - - - -

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Fifth Circuit court of appeals decision in this case – in holding that an appeal, wherein the notice of appeal is untimely filed, may be considered only where the appellant, in not filing a timely notice, relies upon the express statements, as distinguished from implied statements or other actions, of the trial judge that the appellants' post-judgment motions were timely filed – is contrary to the holding and/or rationale of the landmark Supreme Court decisions of Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 321 U.S. 215 (1962) and Thompson v. Immigration and Naturalization Service, 375 U.S. 394 (1964) and is in conflict with such cases from other circuit courts as Pierre v. Jordan, 333 F.2d 951 (9th Cir. 1964) cert. den. 379 U.S. 974; Vine v. Beneficial Finance Co., 374 F.2d 627

(2nd Cir. 1967) cert. den. 389 U.S. 970; Govt. of Virginia Island v. Gereau, 603 F.2d 438 (3rd Cir. 1979); United States v. Calzada, 579 F.2d 1358 (7th Cir. 1978); and Estate of Butler's Tire & Battery Co., Inc. v. Ferrous Financial Services, 592 F.2d 1028 (9th Cir. 1979), thus calling for a grant of writ of certiorari or per curiam reinstatement of this appeal.

II.

Whether the holding of the court of appeals in this case – in refusing to apply the Harris/Thompson rule even though the Petitioners failed to file notice of appeal within 30 days in complete reliance upon the statements and actions of the district court, at the time it heard the Petitioners' post-judgment motions, in admitting that when it rendered summary judgment it was not aware that motions to defer and notices of deposition had been pending; in admitting it was aware of Petitioners' approaching

30-day (the next day) deadline, thus indicating that if it were going to rule against Petitioners it would rule by the next day; and in considering Petitioners' motions solely upon their merits, without any contention by it or Respondents that they were untimely - is contrary to Harris, Thompson and the decisions from circuit courts other than the Fifth Circuit, and so far departs from the accepted course of judicial proceedings as to call for the exercise of the Supreme Court's power of supervision through grant of writ of certiorari or per curiam reinstatement of this appeal.

III.

Whether the failure of the court of appeals, on motion for rehearing, to correct its miscalculation of the date notice of appeal was filed (within 60 days of judgment) and to deem the notice and/or Rule 60(b) (F.R.C.P.) motions (both of which were also filed within such 60-day

period) to constitute motions for an extension of time in which to file notice of appeal pursuant to Rule 4(a)(5), F.R.A.P., is so contrary to the decisions of the various circuit courts of appeal, such as Estate of Butler's Tire & Battery Co., Inc. v. Ferrous Financial Services, supra; Witt v. Merrill, 208 F.2d 285 (4th Cir. 1963); Stirling v. Chemical Bank, 511 F.2d 1030 (2nd Cir. 1975); Alley v. Dodge Hotel, 501 F.2d 880 (D.C. Cir. 1974); and Sanchez v. Dallas Morning News, 543 F.2d 556 (5th Cir. 1976), and so far departs from the accepted course of judicial proceedings, as to call for the exercise of the Supreme Court's power of supervision through the grant of writ of certiorari or per curiam reinstatement of this appeal.

IV

Whether the refusal of the court of appeals to hold that the district court at least

slightly abused its discretion in denying Petitioners' Rule 60(b) motions – despite the fact that the errors of the district court were clear and self-evident, such as failing to reset the summary judgment hearing date, to compel answers to interrogatories, to require affidavits or sworn testimony in support of the summary judgment, and to require the Respondents to clearly identify an alternative foreign forum wherein all Respondents were amenable to process and an adequate remedy was available to Petitioners; despite the fact that Petitioners did not utilize the Rule 60(b) motion as a substitute for appeal (indeed, the motion was filed before the appeal time ran) but was utilized to allow the court to correct its self-evident and clear mistakes without having to resort to the expensive and time-consuming appellate process; that Petitioners filed the motions

within a reasonable time after judgment, one within 30 days, the other within 60 days; that the Petitioners' rights were terminated by dismissal motion, prior to having received a hearing on the merits; that no intevening inequities or prejudice developed in favor of Respondents; and that the equities, giving Rule 60(b) the liberal application it is supposed to have, clearly favor granting Rule 60(b) relief – conflicts with such Supreme Court authorities and authorities from circuit courts, as Klappnott v. United States, 335 U.S. 601 (1948); Compton v. Alton Steamship Co., 608 F.2d 96 (4th Cir. 1979); Radack v. Norwegian American Line Agency, Inc., 318 F.2d 538 (2nd Cir. 1963); Meadows v. Cohen, 409 F.2d 750 (5th Cir. 1969); and Seven Elves v. Eskenazi, 635 F.2d 396 (5th Cir. 1981), and so far departs from the accepted course of judicial proceedings, and so far sanctions such a departure by the district court, as to call

for exercise of the Supreme Court's power of supervision through the grant of writ of certiorari or per curiam remand to the court of appeals for consideration of the appeal on its merits.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE DISTRICT COURT AND CIRCUIT COURT

Petitioners:

Mrs. Aage Lasse Alvestad, Individually and as Representative of the Estate of Aage Lasse Alvestad, and their Minor Daughter

Respondents:

Monsanto Company
Monsanto Oil U.K., Inc.
Dolphin International, Inc.
Dolphin International, S.A.

SPECIAL NOTE OF REFERENCES

For convenience, Monsanto, Inc., a Delaware corporation, will be referred to as "Monsanto"; Monsanto Oil U.K., Inc., a Delaware corporation, will be referred to as "Monsanto U.K."; Dolphin International, Inc., a Texas corporation, will be referred to as "Dolphin U.S."; Dolphin International, S.A., a Panamanian corporation, will be referred to as "Dolphin S.A."

SUBJECT INDEX

	Page
Questions Presented for Review -----	i
List of All Parties to the Proceedings in the District Court and Circuit Court ---------	viii
Special Note of References ---------	ix
Reference to Official and Unofficial Reports of Opinions Delivered by Courts Below ----------	1
Grounds on Which the Jurisdiction of this Court is Invoked --------	2
Constitutional Provisions, Statutes and Rules Which This Case Involves ----------	2
Statement of the Case ----------	3
A. Course of the Proceedings Below and Facts and Procedural Events Relevant to Reasons for Issuance of Writ ----------	3
B. Basis for Federal Jurisdiction in the District Court ----------	15
Reasons Relied on For the Allowance of Writ ----------	16
I. ----------	16
II. ----------	28
III. ----------	33
IV. ----------	39

SUBJECT INDEX (continued)

Page

Conclusion and Prayer ---------- 45

LIST OF AUTHORITIES

Cases	Page
Addickes v. S. H. Kress & Company, 398 U.S. 144 (1970)	42
Alley v. Dodge Hotel, 501 F.2d 880 (D.C. Cir. 1974)	iv,29
Bane v. Spencer, 393 F.2d 108 (1st Cir. 1968)	44
Bass v. Hoagland, 172 F.2d 205, cert. den. 338 U.S. 816	41
Coleman v. Checker Taxi Company, 325 F.2d 853 (7th Cir. 1962)	44
Compton v. Alton Steamship Co., 608 F.2d 96 (4th Cir. 1979)	vi,25,27,40
Dallas v. Long Manufacturing, Inc., 561 F.2d 613 (5th Cir. 1977)	44
Dredge Corporation v. Penny, 338 F.2d 456 (9th Cir. 1964)	41
Estate of Butler's Tire & Battery Co., Inc. v. Ferrous Financial Services, 592 F.2d 1029 (9th Cir. 1979)	ii,iv,29
Enochs v. Sisson, 301 F.2d 125 (5th Cir. 1962)	40,43
Georgia Southern & F.Ry. Co. v. Atlantic Coast Line R. Co., 373 F.2d 493 (5th Cir. 1967)	40

LIST OF AUTHORITIES (continued)

Cases	Page
Govt. of Virginia Island v. Gereau, 603 F.2d 438 (3rd Cir. 1979) ----	ii
Gulf Oil v. Gilbert, 330 U.S. 501 (1953) ----------	26,43
Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962) ----------	i,iii,30
Hernandez-Rivera v. Immigration & Naturalization Service, 630 F.2d 1352 (5th Cir. 1980) ---	29,34
Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (Sup. Ct. 1976) ----	44
Hovey v. Elliott, 167 U.S. 215 (1897) ----------	27
Illinois State Employees Union Council 34, AFL-CIO v. Lewis, 473 F.2d 561 (7th Cir. 1972)-----	44
Kibort v. Hampton, 538 F.2d 90 (5th Cir. 1976) -----	40,41
Klappnott v. United States, 335 U.S. 601 (1948) ----------	vi,40
Lauritzen v. Larsen, 345 U.S. 571 (1953) ----------	43
McDowell v. Celebrezze, 310 F.2d 43 (5th Cir. 1962) -----	27,29,30,37
Meadows v. Cohen, 409 F.2d 750 (5th Cir. 1969) ----	vi,40

LIST OF AUTHORITIES (continued)

Cases	Page
National Screen Service v. Poster Exchange, Inc., 305 F.2d 647 (5th Cir. 1962) ----	42
Needham v. White Laboratories, Inc., 102 S.Ct. 427 denying cert. in re 639 F.2d 394 (7th Cir. 1981) ----------	14,36,37
Norfolk Monument Company, Inc. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 704 (1969) ----------	42
Offshore Company v. Robison, 266 F.2d 769 (9th Cir. 1959) ----	5
Piper Aircraft Company v. Reyno, 103 S.Ct. 252 (1981) ----------	26,43
Parrish v. Board of Commissioners, Alabama State Bar, 533 F.2d 942 (5th Cir. 1976) ----	44
Pierre v. Jordan, 333 F.2d 951 (9th Cir. 1964), cert. den. 379 U.S. 974 ---------	i,34,35
Radack v. Norwegian American Line Agency, Inc., 318 F.2d 539 (2nd Cir. 1963) ----	vi,40
Stirling v. Chemical Bank, 511 F.2d 1030 (2nd Cir. 1975) ---	iv,29
Sanchez v. Board of Regents of Texas Southern University, 625 F.2d 521 (5th Cir. 1980) ----	30

LIST OF AUTHORITIES (continued)

Cases	Page
Sanchez v. Dallas Morning News, 543 F.2d 556 (5th Cir. 1976) ----	iv,14,29
Season-All Indus., Inc. v. Turkiye Sise Ve Cam Fabrik, A.S., 425 F.2d 34 (3rd Cir. 1970) -----	41
Seven Elves v. Eskenazi, 635 F.2d 396 (5th Cir. 1981) ----	vi,25,39
Spinks v. Chevron, 507 F.2d 216 (5th Cir. 1975) ----	5
Terassi v. South Atlantic Lines, 226 F.2d 823 (2nd Cir. 1955) ----	30
Thompson v. Immigration & Naturalization Service, 375 U.S. 384 (1964) ----------	i,iii,33
Tuley v. Heyd, 492 F.2d 788 (5th Cir. 1974) ----	30
United States v. Calzada, 579 F.2d 1358 (7th Cir. 1978) ---	ii
United States v. Lewis, 522 F.2d 1367 (5th Cir. 1975) ---	30
United States v. Schilling Ford, 568 F.2d 1106 (5th Cir. 1978) ---	30
Vine v. Beneficial Finance Co., 374 F.2d 627 (2nd Cir. 1967), cert. den. 389 U.S. 970 ---------	i,36
Windsor v. McVeigh, 93 U.S. 914 (1876) ----------	40
Witt v. Merrill, 208 F.2d 285 (4th Cir. 1953) ----	iv,29

LIST OF AUTHORITIES (continued)

Cases — Page

Wolfson v. Hankin,
376 U.S. 203 (1964) ---------- 33

Bridoux v. Eastern Air Lines, Inc.,
214 F.2d 207 (D.C. Cir. 1950) ---- 25,40

Texts

Wright: Law of Federal Courts,
Section 99 (2nd Ed. 1970) ------

LIST OF APPENDICES

Appendix 1 - Memorandum and Order - August 20, 1980

Appendix 1A- Final Judgment - August 20, 1980

Appendix 2 - Order - September 22, 1980

Appendix 3 - Order - December 16, 1980

Appendix 4 - Decision of United States Court of Appeals, Fifth Circuit, April 1, 1982, as reported at 671 F.2d 908, et seq.

Appendix 5 - Denial of Petition for Rehearing and Suggestion for Rehearing En Banc - May 17, 1982

Appendix 6A- Excerpt of Amendment XIV, Constitution of the United States

Appendix 6B- Excerpt of Rule 4, Federal Rules of Appellate Procedure

Appendix 6C- Excerpt of Rule 26, Federal Rules of Appellate Procedure

Appendix 6D- Excerpt of Rule 12, Federal Rules of Civil Procedure

Appendix 6E- Excerpt of Rule 56, Federal Rules of Civil Procedure

Appendix 6F- Excerpt of Rule 59, Federal Rules of Civil Procedure

Appendix 6G- Excerpt of Rule 60, Federal Rules of Civil Procedure

LIST OF APPENDICES (continued)

Appendix 7 - Excerpts of Motion to Reconsider Order of the Court Dismissing Cause of Action and To Reinstate Cause of Action and Motion to Grant a New Trial Pursuant to Rules 59 and 60 of F.R.C.P.

Appendix 8 - Excerpts of Motion of the Plaintiffs for Relief from the Final Judgment of this Court dated August 20, 1980, Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure and for Relief Under the General Power of this Court to Rescind its Orders and Judgments and Reinstate a Cause of Action and Grant Further Relief

Appendix 9 - Notice of Appeal - Oct. __, 1980

Appendix 10- Letter from Louis R. Koerner, Jr. to Randy McClanahan - February 18, 1980 - re agreement to pass submission date of 2/29/80

Appendix 11- Motion to Defer Determination of Defendants' Motions to Dismiss under Rule 12b of F.R.C.P., on Grounds of Forum Non Conveniens and on Grounds of Limitations - August 6, 1980

Appendix 12- Notice of U.S. District Court Clerk Jesse E. Clark that Plaintiffs' Motion to Defer Determination on Defendants' Motions to Dismiss under Rule 12b F.R.C.P., on Grounds of

LIST OF APPENDICES (continued)

Appendix 12 (continued)- Forum Non Conveniens and on Grounds of Limitations, filed August 11, 1980, is placed on Court's Written Motion Docket for September 1, 1980

Appendix 13- Notice of U.S. District Court Clerk Jesse E. Clark that Plaintiffs' Motion to Reconsider Order Dismissing Cause of Action and Motion to Reinstate and Motion to Grant a New Trial is placed on Court's Written Motion Docket for Oct. 6, 1980.

Appendix 14- Notice of filing of Plaintiffs' Motion to Compel Answers to Interrogatories by Murray L. Harris, Clerk, U. S. District Court, Eastern District of Texas, Sherman Division

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BY COURTS BELOW

1. The initial judgment and opinion of the district court was rendered on August 20, 1980 in Cause No. H-79-1883, in the United States District Court for the Southern District of Texas, Houston Division (unreported). Said judgment and order is attached as Appendix 1.

2. After the Petitioners filed a motion under Rules 59 and 60 of F.R.C.P., the district court, on September 22, 1980, issued an order denying said motion. Said order is attached hereto as Appendix 2.

3. After the Petitioners filed a second motion for relief under Rule 60(b), F.R.C.P., the district court once again, on December 16, 1980, issued an order denying such relief. Such order is attached as Appendix 3.

4. The judgment and order of the United States Court of Appeals for the Fifth Circuit, dated April 1, 1982, is reported at 671 F.2d 908. The opinion and judgment of the Court of Appeals is attached as Appendix 4.

5. The order of the United States Court of Appeals, Fifth Circuit, denying Petitioners' Petition for Rehearing and Rehearing En Banc, dated May 17, 1982, is attached as Appendix 5.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals was entered on April 1, 1982 (App. 4). A timely Petition for Rehearing and Rehearing En Banc was denied on May 17, 1982 (App. 5). The jurisdiction of this Court is invoked under 23 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES WHICH THIS CASE INVOLVES

This case involves directly and indirectly the construction and application of the

following constitutional provisions, statutes and rules of procedure: Amendment 14 to the Constitution of the United States; Rules 4(a)(5) and 26(a), F.R.A.P.; and Rules 12(b)(1), 56, 59 and 60(b), F.R.C.P. These all are reprinted in pertinent part and attached as Appendices 6A-6F.

STATEMENT OF THE CASE

A. Course of Proceedings Below and Facts and Procedural Events Relevant to Reasons for Issuance of Writ.[1/]

1. This case was filed by Mrs. Alvestad on behalf of herself, the estate of her husband, and her daughter (hereinafter "Petitioners"), alleging that while her husband, a diver, was working as a seaman onboard the vessel BORGNEY DOLPHIN, he was killed as a result of the negligence of

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1/ The course of proceedings below and facts necessary to argue the issues are, for the sake of brevity, combined because they are very similar, the issues being primarily procedural and constitutional.

Monsanto, Dolphin U.S., Dolphin S.A. and/or Monsanto U.K. (hereinafter "Respondents"), through the conduct of their agents, servants and employees, and as a result of the unseaworthiness of said vessel. Mr. Alvestad was Norwegian. The Petitioners alleged the vessel was controlled by one or more of the Respondents and that the accident occurred in the British sector of the North Sea (Rec., pp. 1-14, 159-171). The Petitioners sought recovery under the Jones Act, 46 U.S.C. 688, the general maritime law, and the Death on the High Seas Act, 46 U.S.C. 720 (Rec., pp. 9, 10). Suit was filed within three years of the date of the accident but over two years following said date.[2/]

[2/] All Respondents sought dismissal on the ground that the Death on the High Seas statute of limitation applied because this suit was filed more than two years, but less than three years, after the accident in question. The district court held, and we agree with its holding, that suit under the Death on the High

2. All Respondents filed motions to dismiss on the grounds foreign law and the doctrine of forum non conveniens should apply (Rec., pp. 186-88, 172-75, 196-99, 189-90, 114-18). However, they never clearly asserted which foreign forum they contended was an alternative forum; and did not attach affidavits or submit any evidence in support of their motions (see entire Record, and Rec. 172-175, 196-199, 189, 190).[3]

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[2] (continued) Seas Act, 46 U.S.C. 720, et seq, is barred. Since the district court recognized that the Jones Act (46 U.S.C. 688) claim of Petitioners was not barred (the Respondents did not contend it was), the question of limitations will not be hereafter mentioned because the district court implicitly recognized that one or more of the Respondents could be the Jones Act employer of the decedent pursuant to Spinks v. Chevron, 507 F.2d 216 (5th Cir. 1975) and Offshore Company v. Robison, 266 F.2d 769 (5th Cir. 1979).

[3] Respondent Monsanto did attach a general and conclusory affidavit to a motion which was prematurely filed (Rec. 27, 28) and, for such reason, was disregarded

3. Interrogatories aimed at eliciting evidence relative to the forum non conveniens motions were submitted to the Monsanto Respondents but they refused to answer most of them (Rec. pp. 57-58, 68-98). Thereafter, the Petitioners filed a motion to compel answers to unanswered interrogatories (Rec., pp. 57-58). In its "Memorandum Brief in Response to Plaintiffs' Motion to Compel Answers to Interrogatories", Monsanto admitted the unanswered interrogatories were obviously intended to develop information relevant to the choice-of-law and forum non conveniens questions (Rec. p. 64). The court notified all parties of the motion to compel and that it would be submitted and decided unless an oral hearing was immediately requested by either party (2nd Supp. Rec., App. 14). No oral

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3/ (continued)
by the district court (Rec., id.); in any event, that affidavit only applied to Respondent Monsanto and not to the other Respondents, who filed no affidavit

hearing was requested; yet, the district court did not rule upon Petitioners' motion to compel prior to granting Resondents' motion to dismiss (see entire Record).

4. Because the district court had not ruled on Petitioners' motion to compel and the Respondents continued to refuse to answer the interrogatories and produce additional records, the Petitioners commenced efforts to obtain documents relevant to such issues from a non-party, Occidental Petroleum. The district court had placed the motions to dismiss on its motion docket for Feb. 18, 1980 (2nd Supp. Rec.), but the parties agreed and stipulated to pass that submission date pending receipt of the Occidental documents. They further stipulated that after the documents were obtained the parties themselves would seek

3/ (continued)
prior to the court's dismissal order of August 20, 1980 (see entire Record).

a new submission date from the court (Oct. 16 motion, Exhibit 5A, 1st Supp. Rec., p. 63).[4/]

5. The Petitioners were finally able to secure those documents in May 1980 and in June 1980 the Petitioners' then counsel (Mr. Louis Koerner) became involved in an extensive antitrust trial in Pennsylvania and turned the case over to the present lead counsel (Plts. Mot. to Reconsider; No. 64 on Docket Sheet, labeled "Loose in File"). The present lead counsel received and reviewed the file in July 1980 and on Aug. 6,

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4/ Cynthia Norris of Mr. Koerner's office wrote Defendants' attorney, Randy McClanahan, with carbon copy to all attorneys and the Cler, documenting the agreement of the parties "to pass the submission date of February 18, on the outstanding motions in the above-referenced cause until after production of (the) documents . . . after the production of documents, we will need to decide on a date for submission of the motions . . . by copy of this letter, I am advising the Court of our agreement . . ." (Exh. 5A, 1st Supp. Rec., p. 63; see App. 10).

1980, as a precautionary measure, filed a Motion to Defer Adjudication of Defendants' Motions to Dismiss, as well as notices of depositions of the corporate officers of the Respondents, to depose said officers on the matters of choice-of-law and forum non conveniens (Rec., pp. 221a-223 and pp. 224-226; see App. 11). The notices provided that the depositions would be taken on August 26 and August 27, 1980. On August 11, the district court notified all parties that the Petitioners' Motion to Defer had been placed on the court's written motion docket for September 1, 1980 (1st Supp. Rec., p. 86; see App. 12).

6. Therefore, Petitioners were shocked when the district court, without the parties having requested a new submission date for the motions to dismiss (as agreed by stipulation), without the court notifying the parties of a new submission date, without complying with Rule 56, F.R.C.P., or the

local rules concerning notice, without any warning to the parties that it was about to rule on motions to dismiss, and furthermore, leading the parties to believe that it would not act until Petitioners' Motion to Defer had been submitted and decided on September 1, precipitately entered an order on August 20, 1980, dismissing the Death on the High Seas claim as being barred by limitations and dismissing the Jones Act suit on grounds of choice-of-law and forum non conveniens (Rec., pp. 235-238; App. 1 and 1A).

7. Petitioners' counsel did not actually see the court's dismissal order until about September 4, 1980 (upon return from depositions out of the country). Believing the district court may not have realized that, when it ruled on August 20, 1980, the Motion to Defer was pending for hearing at a later date, and depositions were pending, the Petitioners, on September 10, requested a new trial pursuant to Rule 59 and relief

from the August 20 order pursuant to Rule 60 and sought other appropriate relief (Doc. 64, "Loose in File"; Rec., p. 238; these motions will be hereinafter referred to as the "Sept. 10 post-judgment motions"; see excerpts, App. 7). The district court indicated it deemed the Rule 59 motion timely filed because it set a hearing on such motions for October 6, 1980 (2nd Supp. Rec., see App. 13), which was more than 30 days after the August 20 dismissal order. Nevertheless, Petitioners sought a clarification and ruling prior to the passage of 30 days and the court finally agreed to hear the Sept. 10 post-judgment motions on September 18, 1980, the 29th day after the August 20 order (see affidavit attached to October 16 Rule 60(b) motion, Supp. Rec.).

8. At the hearing on September 18, the court stated it had not been aware of Petitioners' pending Motion to Defer and notice of depositions when it ruled on August 20; the court indicated that it

assumed that the Sept. 10 post-judgment motions were timely filed because it proceeded to consider nothing but the merits of the motions and neither the Respondents nor the court raised any questions concerning the motions being untimely; moreover, the court indicated its awareness that the deadline for filing an appeal was September 19; the Petitioners were thus led to reasonably believe one of three things:

(a) That the court would grant Petitioners' Sept. 10 post-judgment motions because of the pending motion to defer and notice of depositions at the time it entered the dismissal order; such action seemed almost certain, based upon the court's words and conduct at the hearing;

(b) That if the court was going to rule against Petitioners and did not do so before the next day, it was because the court deemed Petitioners' Sept. 10 post-judgment motions had been timely filed, thus suspending the running of appeal time; or

(c) That if the court was going to rule against Petitioners and did not believe Petitioners' Sept. 10 post-judgment motions had been timely filed, then it would most certainly rule the next day so that Petitioners could file timely notice of appeal (see

October 16 motion, 1st Supp. Rec., pp. 11-13, 55-56; see excerpts App. 8).

9. When the court did not rule on September 19, the Petitioners did not file a notice of appeal because they assumed that any question of untimeliness of the post-trial motions had been waived by Respondents; that timeliness had been assumed by the court; that the court would certainly rule in Petitioners' favor because of the court's comments at the hearing; and further because Petitioners were aware that this same court had previously taken the view that if Petitioners filed a notice of appeal, the court would lose jurisdiction to rule on the Petitioners' post-trial motions (October 16 motion, 1st Supp. Rec., excerpts App. 8; and see Dec. 16 order, App. 3). Faced with the horns of this procedural dilemma and potential trap, the Petitioners made the only reasonable choice they could make, particularly since the starkly unjust

procedural improprieties of the court had been made known to the court at the September 18 hearing, and the court had indicated by its response that it intended to do something about them: Petitioners awaited the decision of the district court.

10. Thus, Petitioners were again shocked when the court, after delaying its ruling until September 22, three days post-deadline for appeal, ruled against Petitioners (1st Supp. Rec., pp. 12-13, 55-56, 88; App. 2). The court's ruling was solely on the merits; it did not mention any untimeliness of Petitioners' post-trial motions (App. 2).

11. After the court's unexpected ruling, Petitioners filed on October 16, 57 days after the August 20 dismissal order, a motion for relief from said order "pursuant to Rule 60(b) . . . and for relief under the general power of this Court to rescind its order . . . and grant further relief" (see excerpts, App. 8). Petitioners then

filed a notice of appeal on October 20, within 60 days of the August 20 dismissal order[5] (see notice of appeal, App. 9).

12. On December 16, the court ruled, in connection with the October 16 Rule 60(b) motion, that Petitioners had filed "a proper notice of appeal (on October 20) from the Court's Order of Dismissal", and that, therefore, the court was "without jurisdiction" to consider the October 16 Rule 60(b) motion (see App. 3).

13. On January 9, 1981, Petitioners filed a notice of appeal from the December 16 order (1st Supp. Rec., p. 47).

14. The two appeals were consolidated and the court of appeals, without mentioning

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[5] Notice of appeal was filed Monday, October 20, 1980, 61 days after the judgment was signed. However, this was clearly within 60 days because the 60th day fell on Sunday. (See Rule 26a, F.R.A.P.; App. 6E); Sanchez v. Dallas Morning News, 543 F.2d 556 (5th Cir. 1956) and Needham v. White Laboratories, 638 F.2d 394 (7th Cir. 1981) cert. den. 102 S.Ct. 427.

or discussing the due process travesties which occurred when the district court precipitately granted the Respondents' dismissal motions without resetting them and notifying the parties it intended to rule, and after miscalculating the date the first notice of appeal (App. 8) had been filed, proceeded to affirm the district court on the ground that an appeal of the August 20 dismissal order had not been properly perfected and on the further ground that the district court had not abused its discretion in refusing to grant Petitioners' Rule 60(b) motions (See App. 4).

B. Basis for Federal Jurisdiction in the District Court.

The basis of jurisdiction in the district court was the Jones Act, 46 U.S.C. 688, the Death on the High Seas Act, 46 U.S.C. 720, et seq, and the general maritime law of the United States.

REASONS RELIED ON FOR THE ALLOWANCE OF WRIT

I.

THIS CASE INVOLVES IMPORTANT CONSTITUTIONAL AND PROCEDURAL QUESTIONS WHICH HAVE ARISEN OUT OF THE MANNER IN WHICH THIS CASE WAS HANDLED BY BOTH THE DISTRICT COURT AND THE COURT OF APPEALS. PETITIONERS SIMPLY WERE NOT AFFORDED DUE PROCESS OF LAW – THEIR DAY IN COURT – AND THIS COURT SHOULD GRANT WRIT TO PREVENT A SERIOUS EROSION OF THAT INALIENABLE RIGHT.

The procedural improprieties in this case should be shocking to any judicial conscience. Any objective jurist will recognize how embarrassing it must have been to recount the occurrences in this case to the Norwegian attorney who referred it in the first instance. This Court must not tolerate the kind of judicial finessing which took place in this case. Mrs. Alvestad and her children were effectively denied the due process of our judicial system just as surely as if the doors of the courthouse had been closed to her when she attempted to file her original complaint. It is clear that the combination of the procedural

events and actions in both the trial and appellate courts thrust this case beyond the pale of fundamental fair treatment and so far departs from the accepted course of judicial proceedings as to clearly call for the exercise of the Supreme Court's power of supervision.

Why do we say all this? Here is why:

1. At the time the district court entered its order dismissing the Jones Act and general maritime law claims on grounds of forum non conveniens, it did so despite the facts that:

a. the Petitioners' motion to compel answers to interrogatories, which the Respondents themselves had admitted were relevant to the forum non conveniens motions, and which had been pending for several months, had still not been ruled on by the court (many months previously, the court had set submission of the motion to compel);

b. the Respondents had not attached or filed any sworn affidavits or proof in support of the very forum non conveniens motions which the court granted (and no depositions had been taken in connection therewith, nor any other form of sworn evidence was before the court, except Respondents' incomplete answers to Petitioners' interrogatories, which were wholly inadequate to form the basis of a disposition of the forum non conveniens motion for either party);

c. the Petitioners' motion to defer adjudication of the forum non conveniens motion, so that Petitioners could take the depositions of the Respondents' corporate officers with respect to the forum non conveniens motion on August 26 and 27, 1980, not only was still pending when the court precipitately granted the dismissal order on August 20, 1980, but the district court had, just prior to

August 20, set the motion to defer for submission on September 1;

d. And, most importantly, the parties had stipulated that, when the court had first set the forum non conveniens motions for submission in February of 1980, such submission would be passed from the February setting and reset, by agreement of the parties, at a later time, after discovery was completed; despite the fact that such stipulation had been sent to the court, the court did not reset the submission date, and did not give any notice, hint or warning to the parties that it was about to rule, even though it knew, or would have known had it bothered to look at the file, that discovery on the forum non conveniens motion was not even close to completion and the motion obviously was not ripe for a determination.

2. At the time the district court refused to grant the Petitioners' September 10 motion for new trial and/or relief pursuant to Rule 60, it did so despite the facts that:

a. it admitted at the September 18 hearing that it was not aware that Petitioners' motion to defer so as to permit the taking of depositions was pending and had already been set for submission twelve days after the court entered its dismissal order;

b. most, if not all, of the grave travesties listed in No. 1 above were discussed at the September 18 hearing;

c. it treated the September 10 post-judgment motions as if timely filed by its actions in setting the motions for submission after the 30-day appeal period had expired; by considering such motions solely on their merits; by subsequently holding that the notice of

appeal from its order denying the September 10 post-judgment motions was a proper notice of appeal (See App. 5); and by its words and conduct at the September 18 hearing;

d. it waited until three days after the 30-day post-judgment period had expired to deny the September 10 post-judgment motions even though it admitted at the September 18 hearing that it realized that there was only one more day left to run on that period and even though it knew that Petitioners were aware of its view that if Petitioners filed a notice of appeal the court would lose power to rule on the September 10 post-judgment motions (as the court ruled with respect to the October 16 post-judgment motions; App. 5); in other words, the district court knew of the procedural dilemma the Petitioners were faced with if it delayed its ruling beyond 30 days post-judgment.

3. The court of appeals refused to grant a rehearing with respect to its April 1 decision, holding that Petitioners' appeal from the August 20 order had not been properly perfected, despite the facts that it miscalculated the time in which Petitioners filed the October 20 notice of appeal and thus failed to mention or consider the rule adopted in the Fifth Circuit that a notice of appeal filed within 60 days post-judgment constitutes a Rule 4(a)(5) F.R.A.P. motion for extension of time in which to file a notice of appeal [6] and further failed to

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[6] Indeed, the court of appeals proceeded to excoriate Petitioners' counsel by erroneously assuming that no Rule 4(a)(5) motion had been filed within the 60 days post-judgment provided for in Rule 4(a)(5). The court of appeals stated:

> "If on September 18, one day before the running of her time for appeal, Mrs. Alvestad truly believed the district court to be favorably inclined toward her motions and close to an immediate ruling, she could have asked the court for an extension pursuant to Rule 4(a)(5). Even when the ruling did not issue until September 22, three days after her deadline was passed, she still had twenty-seven days under Rule 4(a)(5) in which to

mention the implied finding of the district court that good cause or excusable neglect did exist as reflected by its express holding that the October 20 notice of appeal was a "proper" notice;

6/ (continued)
ask for such an extension."671 F.2d. at 911. As pointed out infra, a notice of appeal filed within 60 days post-judgment does constitute a Rule 4(a)(5) motion and the fact that the court of appeals did not apply such rule was because it miscalculated the time in which the October 20 notice of appeal, alias a Rule 4(a)(5) motion, was filed is made apparent by the above language in the court's opinion as amplified by the following:

> "The district court entered its judgment dismissing Mrs. Alvestad's suit on August 20. She filed her notice of appeal on October 20, sixty-one days later and thirty-one days late." (Emphasis ours, 671 F.2d at p. 910).

The notice was not filed "thirty-one days late" because, as pointed out in footnote 5, the 60th day fell on a Sunday and therefore the filing on the 61st day must be deemed to have been filed within 60 days. Rule 26(a), F.R.A.P. (App. 6C).

4. The court of appeals refused to hold that the district court was guilty of "slight abuse" of its discretion in refusing Petitioners' Rule 60(b) motion and in so doing:

a. unbelievably ignored and never mentioned the serious and grievous improprieties of the district court in failing to set a hearing or give notice to the parties it was going to rule on the summary judgment motions; in granting the motions without any sworn proof having been filed in support thereof; in failing to grant Petitioners' motion to compel answers to interrogatories even though the motion had been pending for several months; and in failing to determine Petitioners' Motion to Defer before it granted the summary judgment even though it had set the motion to defer for a submission date after it granted the summary judgments;

b. ignored and did not mention the "slight abuse" rule, which applies where Petitioners had received no trial on the merits;[7]

c. ignored the fact that Respondents showed no prejudice which would be sustained by them should the court grant the Rule 60(b) motion;

d. failed to apply the consistent rule in other circuits, e.g. in the Fourth Circuit in Compton v. Alton Steamship Co., that "mistakes of law and fact" are grounds for granting relief under Rule 60(b)(1), F.R.C.P.;[8] that due prccess improprieties, such as failing

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[7] The court of appeals, in Seven Elves v. Eskenazi, stated:

> ". . . where denial of relief precludes examination of the full merits of the cause, even a slight abuse may justify reversal", 635 F.2d at p. 402, citing Bridoux v. Eastern Air Lines, Inc., 214 F.2d 207 (D.C. Cir. 1950).

[8] We just simply went into gross shock when we read the court of appeals' incredible comment that "(t)his case contains no . . . facially obvious error" (671 F.2d at p. 913).

to give notice, make a judgment "void" within the meaning of Rule 60(b)(4); and that the combination of all of the errors and improprieties of the district court in this case[9] would mandate the use of the "grand reservoir of the equitable power to do justice in a particular case",[10] provided for in Rule 60(b)(6);

e. and held that the Petitioners used the Rule 60(b) motion as "a substitute" for appeal, all the while ignoring the

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9/ Indeed there were numerous errors committed by the district court in passing upon the merits of the forum non conveniens motions, e.g., the district court failed to apply the very first principle announced by this court in Gulf Oil v. Gilbert, 330 U.S. 501 (1953) and Piper Aircraft v. Reyno, 102 S.Ct. 252 (1981) that the defendants-movants of a forum non conveniens motion must select a specific foreign forum (which they never did in this case) and show that they are amenable to process and that the plaintiffs have an adequate remedy available to them in that forum. The Respondents not only failed to make such a showing in the district court but when asked by the Fifth Circuit panel if they would stipulate to the jurisdiction of the English or Norwegian court, they declined to do so (See Defendants' post-argument briefs filed in the court of appeals).

fact that the Petitioners filed their first Rule 60(b) motion before appeal time had expired and utilized that procedure to "avoid wasting appellate resources on the perfunctory correction of obvious errors . . ."[11]

The foregoing outline of some of the more obvious improprieties in this case should make it obvious that the inexplicable treatment meted out to Mrs. Alvestad simply did not measure up to a fair, just and equitable consideration of her case in the American courts, within the context of the minimum requirements of properly applied rules of law, equity and procedure. As this Court stated in Hovey v. Elliott, 167 U.S. 215 (1897): "Can it be doubted that due process of law signifies a right to be heard . . .?"

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[10] Compton v. Alton Steamship Co., 608 F.2d at pp. 106-107.

[11] See McDowell v. Celebrezze, 310 F.2d 43 (5th Cir. 1962).

II.

WRIT SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS IGNORED AND FAILED TO FOLLOW A LINE OF AUTHORITIES, INCLUDING DECISIONS FROM OTHER CIRCUIT COURTS, WHICH ESTABLISH THAT THE FILING OF A NOTICE OF APPEAL OR MOTIONS WITH LANGUAGE SIMILAR TO THE BROAD ASSERTIONS CONTAINED IN PETITIONERS' TWO RULE 60(b) MOTIONS, ARE SUFFICIENT TO CONSTITUTE MOTIONS FOR EXTENSION OF TIME WITHIN WHICH TO FILE NOTICE OF APPEAL AS PROVIDED FOR IN RULE 4(a)(5), F.R.A.P.

Amended Rule 4(a)(5), F.R.A.P., provides that "the district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed for appeals from civil judgments". Rule 4(a)(5) thus provides 60 days in which to file a motion for extension of time for filing notice of appeal in civil cases.

The court of appeals assumed throughout its decision that no motion for extension of time to file an appeal had been filed [12]

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[12] The probable reason for this is the rank miscalculation by the court of appeals of the date by which the notice of appeal was filed. See footnote 6, supra.

and proceeded to ignore or reject, sub silentio, the decisions of other circuit courts, as well as decisions of its own circuit, which hold that a notice of appeal and other types of motions filed after the 30-day post-appeal period, but within 60 days following the judgment appeal from, as provided for in Rule 4(a)(5), will be construed to constitute motions for extension of time to file an appeal notice. See Estate of Butler's Tire & Battery Company, Inc. v. Ferrous Financial Services, 592 F.2d 1028 (9th Cir. 1979); Witt v. Merrill, 208 F.2d 285 (4th Cir. 1953); Stirling v. Chemical Bank, 511 F.2d 1030 (2nd Cir. 1975); Alley v. Dodge Hotel, 501 F.2d 880 (D.C. Cir. 1974); Hernandez-Rivera v. Immigration & Naturalization Service, 630 F.2d 1352 (9th Cir. 1980); Sanchez v. Dallas Morning News, 543 F.2d 556 (5th Cir. 1976);[13] McDowell v.

[13] Sanchez v. Dallas Morning News, supra, held the notice of appeal itself constituted a request for extension of time pursuant to

Celebrezze, 310 F.2d 43 (5th Cir. 1962); Sanchez v. Board of Regents of Texas Southern University, 625 F.2d 521 (5th Cir. 1980); United States v. Schilling Ford, 568 F.2d 1106 (5th Cir. 1978); United States v. Lewis, 522 F.2d 1367 (5th Cir. 1975); and Tuley v. Heyd, 492 F.2d 788 (5th Cir. 1974). Since the October 20 notice of appeal was filed within 60 days of the August 20 dismissal

13/ (continued)
Rule 4(a)(5), stating "although the record in this case does not disclose the making of such a motion (Rule 4a5 motion), the notice of appeal, which was filed within the extension period, permits the district court to entertain a request for an extension at a later date." Aside from the notice of appeal, the Court should note that the October 16 post-judgment motions are extremely broad and seek any relief the court might give, after reciting all the equitable facts that would constitute excusable neglect and/or good cause. Such motions should be construed to constitute a motion for an extension of time. McDowell v. Celebrezze, supra at 44; Terassi v. South Atlantic Lines, 226 F.2d 823 (2nd Cir. 1955), and the other authorities cited above.

order[14] and both the September 10 and October 16 post-judgment motions were also filed within 60 days of the August 20 dismissal order, the court of appeals should have, pursuant to the above authorities, retained jurisdiction over this appeal and either found that the December 16 order of the district court (finding that Petitioners had filed a "proper" notice of appeal when they filed the October 20 notice; see App. 3) constituted an implied finding of excusable neglect or good cause for an extension of time or remanded the case to the district court for a determination of whether or not excusable neglect and/or good cause existed for extending the time in which to file the notice of appeal.

What we do not understand is why – when we pointed out to the court of appeals, in our motion for rehearing and motion for rehearing en banc, that it apparently had

[14] See footnote 5, supra.

not realized that the 60th day post-judgment fell on a Sunday, thus making the notice of appeal, which constitutes a motion for extension of time in which to file notice of appeal, to have been timely filed – the court of appeals did not grant rehearing and take the action it should have. Having had the miscalculation brought directly to its attention and nevertheless refusing to correct its error, the only plausible conclusion we can reach is that the court of appeals just decided, for reasons it chose not to discuss, to go against the consistent holdings of the other circuit courts, and its own circuit court, and refuse to consider the filing of a notice of appeal within the 60-day period as tantamount to a timely filing of a motion to extend the time for filing a notice of appeal pursuant to Rule 4(a)(5). This Honorable Court should not tolerate this kind of unilateral defiance of the venerable doctrine of stare decisis.

III.

THE COURT OF APPEALS' REFUSAL TO APPLY THE HARRIS/THOMPSON RULE TO THE CIRCUMSTANCES OF THIS CASE IS CONTRARY TO SUPREME COURT DECISIONS IN HARRIS, THOMPSON AND WOLFSON, AND TO DECISIONS OF OTHER CIRCUIT COURTS SUCH AS THE NINTH CIRCUIT IN PIERRE V. JORDAN, THE SECOND CIRCUIT IN VINE V. BENEFICIAL FINANCE CO., THE THIRD CIRCUIT IN GOVT. OF VA. ISLAND V. GEREAU AND THE SEVENTH CIRCUIT IN UNITED STATES V. CALZADA, AND SO FAR DEPARTS FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

In Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962), Thompson v. Immigration & Naturalization Service, 375 U.S. 394 (1964), and Wolfson v. Hankin, 376 U.S. 203 (1964), the Supreme Court excused the appellant's failure to file a timely notice of appeal because of "unique circumstances" which consisted of two elements:

> (1) the party's affirmative action (similar to Petitioners' filing Rule 59 motion) which, if done properly, would have tolled the running of the appeal time; and
>
> (2) the party failed to file notice of the appeal within 30 days in reliance upon the conduct or actions of the parties and/or the court.

The court of appeals has erroneously given such rule an unreasonably narrow construction and has added new requirements which emasculate the meaning and intent of the Harris/Thompson rule. The court of appeals held that the rule can only apply where the court expressly states that the tardy post-trial motion is in fact timely (citing Hernandez-Rivera v. Immigration & Naturalization Service, 630 F.2d 1352 (9th Cir. 1980). Clearly, the court of appeals erred.

There are many cases wherein the action or conduct of the district court which justified application of the Harris/Thompson rule was not explicit and did not consist of an express statement that the post-trial motions had been timely filed. In Pierre v. Jordan, supra, the court dismissed the case in question on August 20, 1963, for lack of jurisdiction over the subject matter (similar to the ruling here). Thirteen days later the appellant moved to "vacate and

set aside the order of dismissal, and to reinstate the action." (The instant case is even stronger because Petitioners specifically filed a Rule 59 motion along with a Rule 60 motion). On September 27, 1963, the court entered an order denying the motion to vacate, it being recited by the court that it did not have jurisdiction over either the parties or the subject matter (nothing being mentioned by the court in the denial order that the post-trial motions were untimely, the same as occurred in this case). On October 7, 1963 (38 days after the order being appealed but only 10 days after the order of the court denying the appellant's post-trial motions), the appellant filed a notice of appeal. In Pierre, supra, the court made no representations to the appellant and there is nothing in the record in that case which indicates the court did anything overt; it simply considered and overruled the appellant's motion on its merits (as was expressly done

by the court in this case). The court of appeals reversed the district court and considered the appeal on the merits.

In Vine v. Beneficial Finance Co., supra, again the court did nothing "explicit". There, the parties agreed to an extension of time of an untimely filed motion and the court received such stipulation but did not sign it or take any "explicit" action in connection therewith and the appeal was allowed.

If there is any doubt concerning the present direction of the Supreme Court, see Needham v. White Laboratories, Inc., 102 S.Ct. 427 denying cert. in re 637 F.2d 394 (7th Cir. 1982). The Supreme Court, with only one dissent, denied certiorari on October 13, 1981, with respect to a court of appeals decision which liberally applied the Harris/Thompson rule.

The court of appeals in this case took the position that the Petitioners should

have filed a motion for extension of time in which to file a notice of appeal pursuant to Rule 4(a)(5) or filed a notice of appeal and then filed motion to remand in the court of appeals. However, these suggested procedures have been soundly criticized.[15/]

In any event, the actions of the district court in this case were more overt and justified greater reason for Petitioners to rely upon such action than the action of the courts in most of the cases granting relief under the Harris/Thompson doctrine. Here, the

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15/ In McDowell v. Celebrezze, supra, the court stated, "Second, it (granting Harris/Thompson relief) avoids the necessity for the anomalous action . . . out of an abundance of caution that a party 'take an appeal within the proper time and also file a motion in the district court and then ask the appellate court to authorize the district court to proceed and determine the motion'. Overburdened courts, trial and appellate, should not have to squander precious time and resources in such artificial maneuvers . . . ." (310 F.2d at 44; emphasis ours). Only one Supreme Court Justice considered the failure to file a Rule 4(a)(5) motion persuasive in a Harris/Thompson inquiry. See Justice Rehnquist's dissent to denial of certiorari in Needham v. White Laboratories, supra.

court clearly manifested, as much as if it expressly stated so, that it considered the post-trial motions timely filed; it set the hearing on the motions after the 30 days would have expired, thus indicating it considered the motions timely filed; at the hearing the court treated the motions solely on their merits, raising no question about their timeliness; the court decided the motions solely on their merits; the court, after having been reminded of the passing of the 30-day period, made statements indicating it would rule the next day or grant Petitioners' motion; and it later found that the initial notice of appeal had been "properly filed".

When these facts are coupled with the court's admission that it had not been aware of other pending motions and depositions when it granted the dismissal order and the court's position that if Petitioners filed a notice of appeal it would lose

jurisdiction over the post-trial motions, it becomes obvious that Petitioners' reliance upon the court's action in not filing notice of appeal on the 30th day was unquestionably reasonable. Indeed, it is obviously the better view to grant Harris/Thompson relief more readily to one who is making a bona fide effort to deal with a procedural trap than one who is acting out of total ignorance.

IV.

IN VIEW OF THE CLEAR AND SELF-EVIDENT MISTAKES OF LAW AND OTHER CIRCUMSTANCES JUSTIFYING RELIEF UNDER RULE 60(b), THE COURT OF APPEALS' AFFIRMATION OF THE DISTRICT COURT'S DENIAL OF PETITIONERS' RULE 60(b) MOTION IS CONTRARY TO MANY SUPREME COURT DECISIONS AND DECISIONS OF OTHER CIRCUITS, ALL AS CITED BELOW, AND SO FAR DEPARTS FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS, AND SO FAR SANCTIONS SUCH A DEPARTURE BY THE DISTRICT COURT, AS TO CALL FOR THE EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

At the outset, the court of appeals erred in failing to apply the "slight abuse" standard mandated in Seven Elves v. Eskenazi, 635 F.2d 396 (5th Cir. 1981), and contradicted numerous decisions of the Supreme Court in

trying to narrow the long accepted rule that either "mistakes of law" or "mistakes of fact" justify relief under Rule 60(b). Klappnott v. United States, 335 U.S. 601 (1948); Radack v. Norwegian American Line Agency, Inc., 318 F.2d 538 (2nd Cir. 1963); Bridoux v. Eastern Air Lines, Inc., supra; Compton v. Alton Steamship Co., 608 F.2d 96 (4th Cir. 1979); and Meadows v. Cohen, 409 F.2d 750 (5th Cir. 1969).

The most palpable, clear and self-evident "mistake" in this case is the court's failure to reset the hearing on the motions to dismiss, give notice to Petitioners and provide Petitioners with a genuine opportunity to prepare for and respond to the motions, and to be heard on a given date. There are several decisions which indicate that the kind of procedure employed in this case is the rankest of errors and, as stated in Windsor v. McVeigh, 93 U.S. 914 (1876), in effect makes the judgment "void". Kibort v. Hampton, 538 F.2d 90 (5th Cir. 1976); Enochs v. Sisson, 301 F.2d 125 (5th Cir. 1962); Georgia Southern & F. Ry. Co. v. Atlantic

Coast Line R. Co., 373 F.2d 493 (5th Cir. 1967); Bass v. Hoagland, 172 F.2d 205, cert. den. 338 U.S. 816; Dredge Corporation v. Penny, 338 F.2d 456 (9th Cir. 1964); Season-All Indus. Inc. v. Turkiye Sise v. Cam Fabrik, A.S., 425 F.2d 34 (3rd Cir. 1970).

In Kibort v. Hampton, supra, the defendants filed a motion to dismiss and for summary judgment and, as the court noted:

> "No hearing was noticed or requested in the motion. Without any further communications of record between the parties and the Court, on October 14, 1975 the Motion for Summary Judgment was granted," (538 F.2d at page 90).

Though the opposing party had been given 10 days' notice initially, the court of appeals held that the district court should have given the parties notice of a specific time by which it intended to rule, the court stating:

> "What the rule contemplates is ten (10) days advance notice to the adverse party that the matter will be heard and taken under advisement as of a certain day . . . here . . . there was no reason for Plaintiff to suspect that the Court was about to rule upon the motion. If the

> Plaintiff had been given notice (of a specific hearing date by the defendant or the Court), he may have submitted additional materials or moved for an extension of time to develop such materials through discovery."

The Court correctly reversed and remanded.[16/]

There are other legal mistakes of law which are just as "clear" and "self-evident" from the record and which demand relief under Rule 60(b):

> (1) the fact that no affidavit or sworn pleadings or evidence was filed in support of the Respondents' motions to dismiss "clearly" mandates that no summary dismissal or judgment be based thereon. See Norfolk Monument Company, Inc. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 704 (1969); National Screen Service v. Poster Exchange, Inc., 305 F.2d 647 (5th Cir. 1962); Addickes v. S. H. Kress & Co., 398 U.S. 144 (1970); and Wright, Law of Federal Courts, Section 99 (2nd Ed. 1970). These authorites require the defendant to produce sworn affidavits or testimony negating all the allegations of the plaintiff's complaints and conclusively establishing the defendants' right to the extremely drastic remedy of summary disposition;
>
> (2) The district court and the court of appeals decided foreign law should apply. However, they never decided which foreign law should apply. Moreover, the memorandum

and order and judgment granted an unconditional dismissal, without requiring the defendants to submit to the jurisdiction of the foreign alternative forum and waive any applicable statutes of limitation. Indeed, the defendants expressly refused, as indicated in their post-judgment briefs in the court of appeals, to do these things. Therefore, the judgment of both the district court and the court of appeals, on their face, violate the clear precept of such venerable decisions as Gulf Oil v. Gilbert, 330 U.S. 501 (1953); Lauritzen v. Larsen, 345 U.S. 571 (1953); and Piper Aircraft Company v. Reyno, supra, holding that a motion for forum non conveniens absolutely cannot be granted until the Court first determines that there is a particular "adequate alternative forum" in which all defendants are amenable to process and an adequate remedy is available to the plaintiffs. In this case, there is absolutely nothing in this record indicating or even implying that any of the four Defendants have an officer, office, assets, or agent for service in Norway, nor is there anything in the record to indicate or imply that Monsanto, Dolphin U.S., or Dolphin S.A. have an office, officer, assets, or agent for service in the U.K. While Monsanto U.K. may be amenable to process in England, it is not amenable to process in Norway. Moreover, there is absolutely no evidence in the record to indicate what the remedy for a potential plaintiff is in England or Norway so this Court can determine whether or not it is adequate;

(3) The district court granted the motions to dismiss without having ruled on the motion to compel, even though it had set

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16/ The same situation prevailed in Enochs v. Sisson, supra: "We do not think that the

the motion to compel for submission long before it ruled on the dismissal motion; even though there were other interrogatories and motion to produce documents pending which had never been responded to by the Respondents; and even though notice of depositions of corporate officers with respect to the grounds for the dismissal motions had been filed. These procedural improprieties are all "clear" error. See Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (Sup.Ct. 1976); Dallas v. Long Manufacturing, Inc., 561 F.2d 613 (5th Cir. 1977); Bane v. Spencer, 393 F.2d 108 (1st Cir. 1968); Coleman v. Checker Taxi Company, 325 F.2d 853 (7th Cir. 1962); Illinois State Employees Union Council 34 AFL-CIO v. Lewis, 473 F.2d 561 (7th Cir. 1972), cert. den. 93 S.Ct. 1364; and Parrish v. Board of Commissioners, Alabama State Bar, 533 F.2d 942 (5th Cir. 1976).

In summary, this case, as in Seven Elves, supra, meets the requirements for Rule 60(b) relief: (1) Rule 60(b) relief has not been sought here as a substitute for appeal; it has been sought because of the equitable and "unique circumstances" hereinabove described and because Rule 60(b) is designed to permit the district court to rectify its clear mistakes and obviate the expense and time for needless appeals; (2) Rule 60(b) should be liberally construed to achieve

16/ (continued)
order entered by the Court below, in the absence of a notice to the Appellant of the time fixed for the hearing, was within its jurisdiction under the quoted portion of Rule 56 . . ." (301 F.2d 126).

substantial justice; (3) the motions were filed within a reasonable time, one within 30 days and the other within 60 days; (4) Petitioners have been deprived of their day in court and trial on the merits, which outweighs the interest of finality of judgments; (5) there are no intervening inequities or prejudice to the Respondents; and (6) the other equitable considerations discussed above cry out for Rule 60(b) relief.

CONCLUSION AND PRAYER

The questions in this case have a significance that reaches across the breadth and depth of potentially all cases instituted in our federal courts. They all vitally affect two of the indispensable legs upon which the platform of due process rests – the right to be heard in the lower court and the right to be heard on the merits of an appeal from an adverse decision in the lower court. When rights so fundamental as these are involved

no one can say that the questions presented do not carry sufficient national importance, and constitute "special and important reasons", so as to justify the granting of writ of certiorari.

Rule 17 of the Supreme Court Rules states that this Court should grant writ of certiorari when the court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of (the Supreme) Court's power of supervision". If there was ever a case that qualified in the foregoing respects, it is this one. If there was ever a case where the district court precipitately granted the drastic remedy of summary judgment, it is this one. If there was ever a case where the salutory Harris/Thompson doctrine should have been applied, it is this one. If there was ever a case where Rule 60(b) relief was mandated, it is this one.

Mrs. Alvestad, whose husband worked side by side with Americans on the BORGNY DOLPHIN, exposed to the same hazards, asks only for fair treatment accorded to all who pursue their rights in our great judicial system – a right to be heard, a right to know when the court is going to rule so that her evidence and responses can be developed and presented by then, a right to have her motions to compel answers to interrogatories and motions to defer adjudication for the purpose of taking depositions ruled upon, and a right to have the district court, which admitted it was aware of the procedural post-judgment dilemma the Plaintiffs were in, to rule and act in good conscience so that the appealing party will at least have the opportunity to have its appeal heard on the merits.

In a nutshell, the one thing the district court knows, the court of appeals knows, and everyone can see from the record by

using hindsight: the district court could have just as easily entered its one sentence order denying the Petitioners' post-judgment relief on September 18 or 19 as on September 22, and had it done so, notice of appeal would have been timely filed. Instead, it chose to orally recognize certain errors in the pre-judgment proceedings (such as being unaware of motions to defer and notices of depositions), intimating that it would act to correct them; indicated it was aware that it should rule, if it was going to rule against Petitioners, by the next day (the 30th day post-judgment); and then inexplicably, and we are sure unintentionally, finessed the Petitioners by waiting three days beyond the 30-day period to rule and then surprisingly ruling against them. Surely, this is the kind of equitable situation Harris/Thompson was designed to correct.

Mrs. Alvestad and her daughter simply ask for a chance to be heard on the merits

of her case at some point in these proceedings and she has been denied this right in both the lower and appellate courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of September, 1982, three true and correct copies of the above and foregoing Petition for Certiorari were sent to Steven DeWolf, of Vinson & Elkins, First City Tower, Houston, Texas, and to Randy McClanahan, of Baker & Botts, One Shell Plaza, Houston, Texas 77002, counsel for Respondents, by United States mail, postage prepaid.

_____

Benton Musslewhite